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IN THE

Supreme Court of the United States

October Term, 1982

RHONDA ROTHBALLER

and

THE PEORIA JOURNAL STAR, INC.

Petitioners

v.

FRANK M. WANLESS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTIONS PRESENTED

I. WHETHER THE APPELLATE COURT BELOW ERRED IN REVERSING SUMMARY JUDGMENT FOR DEFENDANTS ON THE GROUNDS, INTER ALIA, THAT UNDER THE UNDISPUTED FACTS OF THIS CASE, A FAILURE TO FURTHER PURSUE VARIOUS "AVENUES OF INVESTIGATION" MAY SUSTAIN A FINDING OF ACTUAL MALICE AS DEFINED IN *NEW YORK TIMES V. SULLIVAN.*

II. WHETHER THE THIRD DISTRICT APPELLATE COURT OF THE STATE OF ILLINOIS ERRED IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT FOR DEFENDANTS-PETITIONERS, AND IN HOLDING THAT THE ALLEGEDLY DEFAMATORY PUBLICATIONS AT ISSUE ARE NOT, AS A MATTER OF LAW, SUBSTANTIALLY TRUE.

** Pursuant to Supreme Court Rule 281, please be advised that the Peoria Journal Star, Inc. has no parent corporation. It owns all of the stock of PJS Publications, Inc.; Radio Grand; Forks, Inc.; Radio Colorado Springs, Inc.; Radio Billings, Inc.; Great Plains Radio, Inc.; Albuquerque Radio, Inc.; Compass Systems, Inc. and approximately 13% of the Stock of Peoria Development Corporation.

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OPINIONS BELOW

The opinion of the Third District Appellate Court of Illinois is unreported, but set forth in the App. at 1a.

JURISDICTIONAL STATEMENT

This action for libel was filed by Frank M. Wanless in the Tenth Judicial Circuit Court of Illinois on December 29, 1977. On December 18, 1980 Defendants filed a Motion for Partial Summary Judgment alleging defenses of truth, innocent construction, protected opinion, and no actual malice. Said motion was granted by the trial court, over Plaintiff's opposition, on January 21, 1981.

Plaintiff thereupon orally moved to dismiss the balance of his action without prejudice, pending the outcome of his appeal to the Third District Appellate Court of Illinois. Following the filing of briefs, and the Appellate Court's consideration thereof, on May 12, 1982 the Appellate Court entered an order reversing the trial court's summary judgment for Defendants-Petitioners, and remanding the case for trial.

On June 2, 1982, Petitioners filed with the Third District Appellate Court a Motion for Rehearing, which was denied on June 30, 1982. On August 4, 1982, Petitioners filed in the Supreme Court of Illinois a Petition for Appeal as a Matter of Right, which was denied on October 5, 1982. App. at 8a. The Supreme Court of Illinois having declined to hear Petitioners' Appeal, jurisdiction over this matter is conferred on this Court by 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Frank M. Wanless, "city" attorney for the Village of Morton, County of Tazewell, Illinois, filed suit against Petitioners alleging that two articles written by Petitioner Rothballer and published in the Peoria Journal Star were false and

defamatory. Said articles appear in their entirety beginning at App. 9a. The remaining counts which are the subject of this Petition allege that the Articles contained the following false and defamatory assertions or implications:

(a) That plaintiff had been twice paid for preparing annexation papers—by the Village of Morton and by clients wishing to annex to the Village;

(b) That plaintiff was guilty of a conflict of interest in preparing annexation papers for one Fred Schmidgall;

(c) That plaintiff was guilty of a conflict of interest in representing opposite sides in controversies between the Village of Morton and unknown or unnamed parties;

(d) That plaintiff was in a conflict of interest in preparing a rezoning ordinance which rezoned property owned by his wife.

Plaintiff has denied any conflict of interest. In support of Petitioners' asserted defenses of truth it is undisputed that during the period discussed in the articles complained of, plaintiff was on a retainer of $1,500.00 per month as attorney for the Village of Morton, and that one of his official duties was to examine, and approve as being in order, petitions presented to the Village Board for the annexation of property to the Village of Morton. It also is undisputed that on several occasions, Wanless prepared petitions for annexation of property owned by his private clients, including one Fred Schmidgall, and then, as part of his official duties, reviewed and approved said petitions for presentation to the Village Board. It also is undisputed that Mr. Wanless did also prepare a petition for rezoning of his wife's property.

With respect to the claim of Constitutional privilege under *New York Times v. Sullivan,* 376 U.S. 254 (1964), Petitioners assert that Mr. Wanless, in response to their Motion for Partial Summary Judgment, was unable to "offer some evidence upon which a jury could find [proof with] convincing clarity of actual malice or reckless disregard." *Ragano v. Time, Inc.,* 302 F. Supp. 1005, 1010 (M.D. Fla. 1969) (footnote omitted). The Appellate Court's judgment that a genuine issue of material fact existed with respect to whether Petitioners published with actual malice is plain error. Petitioners maintain that given the undisputed extensive factual investigation undertaken by Petitioner, Rothballer in preparing the challenged publications, the alleged failure to pursue two additional "avenues of investigation," App. at 5a, *cannot* constitute actual malice.

Petitioners maintain that the articles merely relate the fact of Mr. Wanless' dual representation of annexation petitioners and the Village Board, state the ethical provisions identifying and governing conflicts of interest, and published various persons opinions as to the applicability of those ethical provisions to Wanless' conduct. Petitioners assert, however, that the articles "leave it up to the readers to draw their own conclusions." App. at 4a.

I.

THE COURT BELOW ERRED IN REVERSING SUMMARY JUDGMENT FOR THE SOLE REASON THAT DEFENDANT HAD FAILED TO PURSUE TWO AVENUES OF INVESTIGATION PRIOR TO PUBLICATION

In *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), the Supreme Court established constitutional protections for media defendants in defamation actions. The Court held that public officials must prove by clear and convincing evidence that defamatory statements were published with actual malice; that

is, with knowledge of falsity or reckless disregard for truth. In rejecting the common law rules of strict liability and presumed damages, the Court reaffirmed its commitment to the principle that uninhibited discussion of the conduct of public officials was fundamental to the operation of the American system of government. *Id.*, at 270.

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . self-censorship.

Id., at 279.

In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), this Court held that actual malice in the form of reckless disregard for truth requires "a high degree of awareness of their probable falsity."

This Court further refined the definition of actual malice in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), holding that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity."

> 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id., at 730-31.

This Court's ruling in *St. Amant* v. *Thompson, supra,* identified the following evidence that may be employed to attempt to establish "actual malice":

1. The communication has been fabricated by the defendant;

2. It is the product of the defendant's imagination;

3. It is based wholly on an unverified anonymous telephone call;

4. It contains allegations that are so inherently improbable that only a reckless person would put them in circulation;

5. It is published despite obvious reasons to doubt the veracity of the informant upon whom the article is based or the accuracy of his reports.

The appellate court below found no evidence of any of the foregoing.

It is undisputed that mere failure to investigate does not in itself establish "actual malice." *St. Amant, supra,* at 733. It is equally well settled that a mistake in interpreting events or documents does not evidence the necessary state of mind. *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971); *Orr* v. *Argus-Press*

Co., 586 F.2d 1108 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979). Publishing facts harmful to the plaintiff while not publishing others that were mitigating does not constitute actual malice. *Reliance Insurance Co.* v. *Barron's*, 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977). It is similarly insufficient for a plaintiff to point to vituperation or exaggerated language. *Guthrie* v. *Annabel*, 50 Ill. App. 3d 969, 365 N.E. 2d 1367, 3 Media L. Rep. (BNA) 1152 (1977); *Rose* v. *Koch*, 278 Minn. 235, 154 N.W. 2d 409 (1967). Such evidence does not indicate a publisher's lack of belief in the truth of his statements.

Investigative failures, if they do not in context indicate knowledge of falsity or subjective awareness of probable falsity, cannot themselves constitute "actual malice." *St. Amant* v. *Thompson, supra*, at 733. Defendants have been held to be free of "actual malice" despite a general failure to investigate, *Id.*, failure to talk to the plaintiff before publication,[1] failure to verify information,[2] publication of material incapable of verification,[3] failure to discover that published material relied upon had later been retracted,[4] and failure to discover contradictory material in the defendant's files but not at the time of publication actually known to the defendant's employees responsible for the particular publication.[5]

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[1] *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F.2d 346 (8th Cir. 1968); *Malerba v. Newsday, Inc.*, 64 A.D.2d 623, 406 N.Y.S.2d 552, 4 Media L. Rep. (BNA) 1110, (N.Y. App. Div. 1978).

[2] *Samborsky v. Hearst Corp.*, 2 Media L. Rep. (BNA) 1638 (D. Md. 1977); *Fadell v. Minneapolis Star and Tribune Co., Inc.*, 425 F. Supp. 1075, 2 Media Rep. (BNA) 1961 (N.D. Ind. 1976), *aff'd* 557 F.2d 107, 2 Media L. Rep. 2198 (BNA) (7th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977).

"While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity', may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official." *New York Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966).

[3] *Hotchner v. Castillo-Puche*, 551 F.2d 910, 2 Media L. Rep. (BNA) 1545; (2d Cir. 1977), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

[4] *Alpine Construction Co. v. DeMaris*, 358 F. Supp. 422 (N.D. Ill. 1973).

[5] *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 2 Media L. Rep.

(Footnote continues)

Failure to investigate constituted the only ground indicating a reckless state of mind and formed the basis for reversal of summary judgment by the court below:

> Plaintiff has shown avenues of investigation not pursued by defendants. Plaintiff alleges that the defendants failed to investigate and interview Fred Schmidgall whose annexation case was part of the alleged conflict of interest. Plaintiff also alleges that the defendants failed to check the status of a complaint filed against plaintiff with the Disciplinary Commission relating to these charges, which complaint was known to defendants. These omissions may well be excusable; however, the issue of whether the facts and circumstances of this case disclose a reckless disregard for the truth is not so free from doubt that an answer can be said to exist as a matter of law. The inaccurate statements made by defendants that plaintiff represented parties before the village board and was paid twice for the same work lend additional support to this conclusion.

App. at 5a-6a.

It is apparent that the allegedly "inaccurate statements made by defendants" are the only other basis for actual malice. Inaccuracy or even outright falsity of a statement can never give rise to liability absent evidence of a defendant's subjective awareness of falsity. *New York Times, supra.* The *only* evidence of a reckless or knowing state of mind cited by the court below is the defendants' failure to pursue two avenues of investigation. The decisional authorities of this Court unequivocally hold that such evidence can never rise to the level of "clear and convincing" proof of reckless or knowing falsehood.

(Footnote continued)

(BNA) 1334, (N.D. Cal. 1977); *Pauling v. Nat'l. Review, Inc.*, 49 Misc. 2d 975, 269 N.Y.S.2d 11 (N.Y. Co. 1966), *aff'd*, 27 A. D. 903, 281 N.Y.S.2d 716 (1st Dep't 1967) *aff'd*, 22 N.Y.2d 818, 292 N.Y.S.2d 913, 239 N.E.2d 654 (1968).

From the foregoing, it is apparent that the Court below erred in failing to affirm the trial court's action granting summary judgment in derrogation of the defendants' First Amendment rights as established by this Court.

II.

THE ALLEGED LIBELOUS STATEMENTS ARE SUBSTANTIALLY TRUE AS A MATTER OF LAW

Truth is a complete defense to defamation liability in public official/public figure libel litigation.

> [I]n defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; and the message of *New York Times Co. v. Sullivan...*, *Garrison v. Louisiana...*, *Curtis Publishing Co....*, and like cases is that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-90(1975) (footnote and citations omitted).

See also W. Prosser, Law of Torts § 116 (4th ed. 1971); Cf. Ill. Art. I, § 4. A public official libel plaintiff must not only plead and prove falsity as an element of the tort of libel, but he must establish falsity "with convincing clarity." *Pape v. Time, Inc.*, 294 F. Supp. 1087 (N.D. Ill. 1969), *rev'd on other grounds*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971). A defendant need not prove the literal truth of each precise statement made. "Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." Restatement (Second) of Torts § 581A comment f (1976). Moreover, the omission of minor details "in an otherwise basically accurate account is not actionable." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.2d 943, 366 N.E.2d 1299, 2 Media L. Rep. (BNA) 1169, *cert. denied*, 434 U.S. 969 (1977), so long as the article as a whole does not contain a defamatory imputation. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967) ("We ... hold that a 'public

figure' who is not a public official *may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent"* (emphasis added)).

The assertions alleged by Mr. Wanless to be false and defamatory, as set forth in subparagraphs 8(a), 8(b), 8(e) and 8(k) of the Complaint and addressed by the Third Appellate Court of Illinois are:

> "(a) That plaintiff has been twice paid for preparing annexation papers—by the Village of Morton and by clients wishing to annex to the Village;
>
> (b) That plaintiff was guilty of conflict of interest in preparing required annexation papers for one Fred Schmidgall;
>
> (e) That . . . plaintiff had been guilty of a conflict of interest in representing opposite sides in controversies between the Village of Morton and unknown or unnamed parties;
>
> (k) That . . . plaintiff was in a conflict with his official duties in preparing a rezoning ordinance which involved his wife's property.

The court below found that "[n]one of the[se] statements can be said to be true as a matter of law." App. at 5a-6a.

The truth of allegations that Plaintiff Wanless, in preparing for the Board's consideration of annexation petitions on behalf of Fred Schmidgall and others, was guilty of numerous conflicts of interest, was found by the court below to present a jury question. Therefore, held the court, summary judgment was inappropriate even though "the basic facts do not seem to be in dispute." *Id.*

These undisputed facts are as follows:

> (a) Wanless did prepare for Fred Schmidgall and others annexation papers which were presented for consideration by the Morton Village Board at the same time that Wanless was serving as counsel to the Morton Village Board;

(b) That Canon 9 of the Illinois Code of Professional Responsibility does provide that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

(c) That Illinois State Bar Association Opinion 289 holds that Canon 9 "prohibits the lawyer in public employment, among other things, from accepting representation of a person or corporation who seeks favorable consideration on any matter pending before the public body by which he is employed."

(d) That Plaintiff does not believe his actions pose a conflict of interest because, in his view, a conflict is raised only when he urges the adoption of one of his clients' proposals which is not "in harmony with what the Village want[s] to be done."

(e) That various commentators—including former State's Attorney Bode, Attorney Ludwig Kolman of the Better Government Association of Chicago, and Village Trustee Ruth Ferguson—disagreed with Plaintiff's definition of conflict of interest and/or his role in preparing annexation petitions for private clients; and

(f) That the Morton Village Board voted not to adopt a proposal of one of its Trustees that Plaintiff prepare all annexation petitions at no cost to the annexing party, who nevertheless would still pay annexing fees to the Village.

Petitioners respectfully submit that the application of these undisputed facts to the professional canons on conflict of interest clearly falls within the province of the court, and not the jury.

In their Motion for Summary Judgment, Petitioners bore the burden of proving that no genuine issue of fact exists and that they are entitled to judgment as a matter of law. The production of enough evidence to demonstrate Petitioners' entitlement to a judgment if their evidence were uncontroverted at trial, then shifted to Plaintiff Wanless, the party opposing the motion, the burden of demonstrating at least a plausible ground for maintaining his cause of action, notwithstanding Petitioners'

contrary proofs. *See, e.g., Nader v. de Toledano,* 408 A.2d 31 (D.C. 1979); *Repsold v. New York Life Insurance Co.* 216 F.2d 479, 483 (7th Cir. 1954).

Motions for summary judgment must be construed in a light most favorable to the party opposing summary judgment, *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962); *Pedrick v. Peoria & Eastern RR,* 229 N.E.2d 510, 513-14 (Ill. 1967), however, the fact issue to justify a trial of this case must be material.

Restatement (Second) of Torts §614 (1976) provides:

> "(1) The court determines
>
> (a) whether a communication is capable of bearing a particular meaning, and
>
> (b) whether that meaning is defamatory.
>
> (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.

Thus, insofar as it is the function of the trial court to determine whether the publication is capable of being found defamatory, it is the court's duty to determine whether the publication is capable of being found false.

In opposition to Petitioners' Motion for Summary Judgment, Plaintiff Wanless filed no affidavits nor other rebuttal until after the Court had entered Summary Judgment for Defendants. The appellate court acknowledged that there was no dispute as to a material *fact* to be resolved by the jury. The only thing to be resolved was whether said facts constitute a conflict of interest. App. at 5a.

The Appellate Court below based this holding upon *Welch v. Chicago Tribune Co.,* 34 Ill. App.3d 1046, 340 N.E.2d 539 (1975). The issue presented in *Welch, supra,* was whether the plaintiff was an "alcoholic," based upon the undisputed fact that he drank fourteen to eighteen bottles of beer a day. The Court in *Welch, supra,* allowed the *jury* to determine whether

such drinking substantiated the charge of alcoholism because the court recognized the scientific fact that whether such drinking constitutes alcoholism "can vary from person to person." *Id.*, at 1054.

By contrast, in the instant case, the Illinois State Bar Association has already determined, conclusively as a matter of law, that an attorney engages in a conflict of interest when he acts as Wanless did: (a) when "a city attorney represent[s] an individual at a hearing before the city Zoning Board of Appeal or prepare[s] legal forms of presentation of the issues." ISBA Opinion No. 274; or (b) when "a member of the legal staff of a municipal corporation ... represents[s] a client before the city's planning commission." ISBA Opinion No. 289.[6]

Thus, under the applicable law of Illinois pertaining to professional conflicts of interest, a jury could not reasonably find that Wanless' conduct did not constitute such a conflict.

As noted, *supra*, Plaintiff Wanless failed to submit to the trial court affidavits or other pleadings opposing Petitioners' Motion for Summary Judgment.

On appeal, however, Plaintiff argued that he did not present his clients' annexation petitions to the Board. Rather, "these papers were delivered to the Village Clerk who later presented them to the Board." Appellants' (Plaintiffs') Brief to the Third Judicial Appellate Court of Illinois at 18. This distinction clearly does not make Petitioners' publication untrue. The annexation papers were prepared by Wanless for presentation to the Village Board, and their preparation alone by Wanless creates a conflict of interest.

Wanless also argued on appeal below that he was not guilty of a conflict of interest because "he was not benefitting financially by actions which he could influence." *Id.*

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[6] Any distinctions between the Village Board of Morton and a city's "zoning board" or "planning commissions" are irrelevant to the rules prohibiting a municipal attorney's representation of private clients on matters to be addressed by the governmental body to which said attorney is legal counsel.

The articles in question, however, do not state that Plaintiff benefitted financially from annexation decisions of the Village Board. They quoted persons who felt that Plaintiff engaged in conflicts of interest by acting on behalf of both parties to annexation proceedings. The articles also reported the fact that land owned by *Plaintiff's wife* increased in value due to the adoption of a rezoning ordinance prepared by Plaintiff. Finally, they published pertinent portions of Canons 5 and 8 of the Illinois Code of Professional Responsibility requiring that a lawyer exercise his professional judgment "free of compromising influences and loyalties," and condemning an attorney's professional involvement in matters wherein "his personal or professional interests are or . . . *may be in conflict with his official duties.*"

Petitioners did not state or reasonably imply that their assertions of a conflict of interest on Wanless' part turned on his having benefitted financially from annexations or other zoning resolutions enacted by the Board.

Thus, the undisputed fact that Wanless prepared annexation papers for presentation to the Village Board—to which he was legal counsel—makes the assertions of conflict of interest true. Similarly, the fact that Plaintiff involved himself in legal proceedings which posed even the reasonable potential for conflicting loyalties on his part creates—as accurately reported—a conflict of interest. Whether Plaintiff's interests were or were not in fact in harmony with the interests of the Village Board is irrelevant to whether he violated the ethical canons on conflicts of interest.

The final element of alleged libel upon which the trial court granted summary judgment is the assertion that plaintiff Wanless was paid twice for preparing annexation papers—by the Village of Morton and by clients wishing to annex to the Village. Plaintiff Wanless argued to the appellate court below that this allegation is false because he never was paid twice—by the Board and by private clients—for doing the same thing. Yet the deposition testimony of plaintiff Wanless demonstrated that plaintiff was paid by private clients for drafting annexation petitions, and also exercised and approved said petitions while acting in his capacity as Village Attorney. Plaintiff admitted

they were voted on by the Village Board. Plaintiff also admitted that, pursuant to his official duties, he attended Village Board meetings when said annexation petitions were presented, he gave his approval thereto, and he charged the Board for his time in attendance at said meetings. Plaintiff's examination and approval of petitions at the Village's expense is not perhaps the same as drafting said petitions at the expense of private clients, yet it surely constitutes "preparing" said petitions for proper consideration by the Board; and, when considered in the context of the entire article, the article remains substantially true.

CONCLUSION

Because of the substantial issues of constitutional law involved in this case, Petitioner respectfully requests that the Petition for Certiorari to the Illinois Supreme Court be granted.

Respectfully submitted,

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STATE OF ILLINOIS
APPELLATE COURT THIRD DISTRICT
OTTAWA

81-139

At a term of the Appellate Court, begun and held at Springfield, on the 1st Day of January in the year of our Lord one thousand nine hundred and eighty-one, within and for the Third District of Illinois:

Present—

HONORABLE FREDERICK S. GREEN,
Presiding Justice

HONORABLE JAMES T. LONDRIGAN,
Justice

HONORABLE ALBERT G. WEBBER, III,
Justice

JULEANN HORNYAK, Clerk

BE IT REMEMBERED, that afterwards on May 12, 1982 the Order of the Court was filed in the Clerk's Office of said Court, in the words and figures following viz:

No. 81-139

IN THE

Appellate Court of Illinois

THIRD DISTRICT

FRANK M. WANLESS,
Plaintiff-Appellant,

v.

RHONDA ROTHBALLER and
THE PEORIA JOURNAL STAR, INC.,
Defendants-Appellees.

Appeal from Circuit Court
Peoria County No. 77-L-5147

Honorable Robert E. Hunt,
Judge Presiding.

"Not To Be Published"

RULE 23 ORDER

Plaintiff filed his four-count complaint on December 28, 1977. Counts I and II allege that plaintiff was libeled by defendant Rothballer, a newspaper reporter. Counts III and IV allege that plaintiff was libeled by Rothballer's employer, the Peoria Journal Star. The alleged libelous statements were contained in a series of articles published in the Journal Star in 1977.

Each count of plaintiff's complaint contained an identical paragraph 8. Paragraph 8 included 15 subparagraphs which allege that specific aspects of the statements are libelous. On December 18, 1980, defendants filed a motion for partial

summary judgment as to subparagraphs 8(a), 8(b), 8(e) and 8(k). These particular subparagraphs of plaintiff's complaint are set forth below:

> "(a) that plaintiff had been twice paid for preparing annexation papers—by the Village of Morton and by clients wishing to annex to the Village;
>
> (b) that plaintiff was guilty of conflict of interest in preparing required annexation papers for one Fred Schmidgall ***.
>
> * * *
>
> (e) that it was stated plaintiff had been guilty of a conflict of interest in representing opposite sides in controversies between the Village of Morton and unknown or unnamed parties;
>
> * * *
>
> (k) that the article stated plaintiff was in a conflict of interest in preparing a rezoning ordinance which involved his wife's property."

The trial court granted the motion on January 21, 1981. Plaintiff filed a motion to reconsider, which was denied on February 20, 1981. The trial court's order confirmed the grant of a partial summary judgment and found that there was no just reason to delay the appeal. Plaintiff then orally moved to dismiss the remainder of his complaint without prejudice pursuant to section 52 of the Civil Practice Act (Ill. Rev. Stat. 1979, ch. 110, par. 52). The trial court granted the motion.

The sole issue before this court on appeal is whether the trial court properly granted defendant's motion for summary judgment. Defendants contend that the grant of summary judgment was proper for any of the following three reasons: (1) the statements made were capable of an innocent construction; (2) the statements made were true as a matter of law; and (3) the statements made were not, as a matter of law, made with actual malice.

The innocent construction rule provides that the allegedly defamatory article must be read as a whole and that words are to be given their natural and obvious meanings. The words which are alleged to be libelous must be given an innocent construction where such a construction is possible. Words which can be innocently construed are to be declared nonactionable as a matter of law. *John v. Tribune Company* (1982), 24 Ill. 2d 437, 442, 181 N.E.2d 105, 108.

The statements made in the present case are not capable of innocent construction. Subparagraph (a) clearly states plaintiff was paid twice for doing the same work. There is nothing in the remainder of the article to suggest any other interpretation of this statement.

Subparagraphs (b), (e), and (k) alleged defendant stated plaintiff was guilty of a conflict of interest. Although the articles never state directly that plaintiff was guilty of a conflict of interest, read as a whole they do clearly charge plaintiff with such a conflict. Defendants assert the articles leave it up to the readers to draw their own conclusions. But, given the presentation of facts by defendants, the readers are left with no alternative. It is not necessary to state directly that plaintiff was guilty of a conflict. Imputation is enough. See *Dombrowski v. Shore Galleries, Inc.* (1978), 59 Ill. App. 3d 237, 376 N.E.2d 45; *Spanel v. Pegler* (7th Cir. 1947), 160 F.2d 619.

None of the statements can be said to be true as a matter of law. There is no direct evidence that plaintiff was paid twice for doing the same work. Contrary to defendants' assertion, plaintiff did not state it was his duty to examine and approve all legal documents submitted to the village. Rather, plaintiff stated the board did not ask for his recommendation for approval on annexation papers he prepared. It cannot be said plaintiff was paid under the standing remuneration agreement as if he gave such a recommendation since he stated that if he worked less than 60 hours a month, he credited the village for the difference.

The statements imputing that plaintiff was guilty of a conflict of interest, as alleged in subparagraphs (b), (e), and (k) of paragraph 8 of the complaint, do not support the grant of summary judgment. Although the basic facts do not seem to be in dispute, whether those facts constitute a conflict of interest on plaintiff's part is a question of fact (cf. *Welch v. Chicago Tribune Co.* (1975), 34 Ill. App. 3d 1046, 340 N.E.2d 539.) In *Welch,* the First District found that the issue of whether plaintiff was an alcoholic was an issue of fact that should have been submitted to a jury. The court held this despite the fact that plaintiff admitted consuming 14 to 18 bottles of beer a day. In the case at bar, the question of whether plaintiff was engaged in a conflict of interest was a jury question; summary judgment on that basis was inappropriate.

Plaintiff and defendant agree that plaintiff must show actual malice, as defined in *New York Times v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710, on defendants' part in order to recover damages for libel. Actual malice, as defined in *Sullivan,* is "with knowledge that it [the statement] was false or with reckless disregard of whether it was false or not." (376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 726.) In order to show reckless disregard on the part of defendants, plaintiff must present sufficient evidence for the trier of fact to conclude that defendants "in fact entertained serious doubts as to the truth" of their publication, *St. Amant v. Thompson* (1968), 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267, 88 S. Ct. 1323, 1325, or had a "high degree of awareness of *** probable falsity." *Garrison v. Louisiana* (1964), 379 U.S. 64, 74, 13 L. Ed. 2d 125, 133, 85 S. Ct. 209, 216.

Plaintiff has shown avenues of investigation not pursued by defendants. Plaintiff alleges that the defendants failed to investigate and interview Fred Schmidgall whose annexation case was part of the alleged conflict of interest. Plaintiff also alleges that the defendants failed to check the status of a complaint filed against plaintiff with the Disciplinary Commission relating to these charges, which complaint was known to defendants. These omissions may well be excusable; however, the issue of whether the facts and circumstances of this case disclose a reckless disregard for the truth is not so free from

doubt that an answer can be said to exist as a matter of law. The inaccurate statements made by defendants that plaintiff represented parties before the village board and was paid twice for the same work lend additional support to this conclusion.

We make no decision regarding the ultimate issue of whether plaintiff may recover from defendants. We merely hold that the factual questions heretofore outlined are for the jury to answer. The order granting summary judgment for defendant on subparagraphs (a), (b), (e), and (k) of paragraph 8 of each count of plaintiff's complaint is reversed and the cause is remanded to the circuit court of Peoria County for further proceedings consistent with the views expressed herein.

Reversed and remanded.

Order drafted by LONDRIGAN, J., concurred in by WEBBER, J., and GREEN, P.J., dissenting in part and concurring in part.

STATE OF ILLINOIS,
APPELLATE COURT, ss.
THIRD DISTRICT,

As Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, I do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in this office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of May in the year of our Lord one thousand nine hundred and eighty-two.

/s/ JOSEPH FORMERLEY
Clerk of the Appellate Court

Mr. PRESIDING JUSTICE GREEN, dissenting in part and concurring in part:

I deem the information properly before the trial court to have shown, as a matter of law, that defendants did not act with malice in making the statements imputing to plaintiff a conflict of interest as alleged in subparagraphs (b), (e), and (k). No evidence indicated the statements were known by defendants to be false. Defendant Rothballer was shown to have made an extensive investigation of the question of whether plaintiff's activities created a conflict of interest. Evidence that she failed to make inquiry of the Disciplinary Commission or of Fred Schmidgall falls far short of establishing any basis for a factual determination that she acted with reckless disregard for the truth. The summary judgment for defendants should be affirmed in respect to the allegations of those subparagraphs.

For the reasons stated by the majority, I agree that the summary judgment should be reversed as to the allegations of subparagraph (a).

Illinois Supreme Court
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

October 5, 1982

Mr. Ross E. Morris
Attorney at Law
225 W. Lincoln
P.O. Box 151
Lewistown, IL 61542

No. 57107— Frank M. Wanless, respondent, vs. Rhonda Rothballer, et al., etc., petitioners. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ JULEANN HORNYAK
Clerk of the Supreme Court

Annexing To Morton . . . Village Atty. Wanless Paid By Private Clients, Taxpayer

By Rhonda Rothballer

MORTON—Village Atty. Frank M. Wanless has been paid twice for preparing annexation papers—by the village and by clients wishing to annex to the village.

He has presented annexation petitions for his clients while acting as the board attorney.

A public official has a conflict of interest when he could personally benefit financially be a governmental action, which he could directly or indirectly influence.

Former Tazewell County State's Atty. C. Brett Bode said he repeatedly told Wanless to stop this practice, but the policy went unchanged. Last February the Village Board reaffirmed the village's annexation procedure, permitting Wanless' dual representation.

At Monday's Village Board meeting, Wanless said he has stopped representing both sides in annexation cases. He said he never thought there was a conflict of interest in the board's policy.

Because of the controversy, however, he said he decided not to represent individuals wishing to annex to the village.

He made this decision "at least six months ago," but decided to announce it publicly Monday.

Six months ago would have been last July, when he represented Fred Schmidgall who wished to annex to the village. Schmidgall lives on N. Morton Ave., and his annexation fee was established by the village.

Six months ago would have also been five months after the controversy was quieted by the board's reapproval of the annexation procedure.

During the interim from July to Janaury, there has been only one annexation request. That was from Schrock Builders in October, and the firm's attorney represented the company in its petition.

Wanless hasn't represented any individuals petitioning for annexation during the past five months. But there haven't been any such requests before the board.

Wanless' dual involvement was questioned last July by Trustee Ruth Ferguson. He replied that he was a private lawyer as well as the village attorney.

"I have to make a living too," he said.

The village ordinance still permits the policy of the village attorney representing both sides during annexation cases.

Mayor Eugene Mathis supported the practice in September. And Wanless said he supported the policy when questioned, about it Oct. 29.

Mayor Eugene Mathis said Wanless prepares annexation papers when the matter "is all cut and dried and the board has set up annexation fees in certain areas." For example, anyone living along N. Morton Ave. could annex to the village for a $1,200 fee.

"Frank (Wanless) will prepare the annexation papers for these people," Mathis said. Those individuals will also pay Wanless for his services. He determines the fee, which is usually about $80.

In cases where persons petition the board for annexation and a fee has yet to be set, Wanless will not represent the individuals, Mathis said.

"When all the rules of annexation are laid down," Wanless said he does the legal work: "We have a policy, for the most part, that the village annexes property only contiguous to the village with the terms the board sets down by ordinance.

"I've always declined when a matter wasn't set ... But, otherwise, oh, why not? If they want me to prepare it, I would do it," Wanless said.

Former State's Atty. Bode said he didn't take any action against Wanless because he didn't consider his dual legal service a criminal act.

"It is legally, ethically improper to represent both sides of any controversy or contract, especially by a public attorney, employed by the public, the taxpayers," he said.

"It's a simple conflict. The simple man on the street can see that." Bode said even when there is only an appearance of impropriety, the action should be avoided.

"I've made no secret of it. Some of the transactions at least had the appearance of impropriety. I, personally, think he should avoid such a thing," Bode said.

He requested a formal opinion from Illinois Atty. Gen. William J. Scott about this annexation method. But, before it was finished, Bode left his office to new State's Atty. Bruce Black.

Black must now decide if he wants the opinion completed and released.

Besides the ethical reasons, Bode said Wanless could misuse his authority.

Charges alleging conflicts of interest and other related practices have been swirling about the Morton Village Board recently. This is the last of a series of articles looking into the allegation in some detail.

"He could harass someone who wants to do something. He can bog them down in red tape. Someone else, one of the 'in crowd,' could get by without requiring all sorts of things of him. In local government, favoritism runs rampant," Bode said.

Because Wanless knows all the village laws and codes, any other attorney would take more time checking the necessary information to prepare an annexation petition, Mathis said.

Disputing Mathis' reasoning, Wanless said it's easy for attorneys to prepare annexation papers.

"I've prepared papers for other communities. You just check the pecularities of the codes, It's not a major task; most any attorney can do it," he said.

Tazewell County State's Atty. Black said he considers it unethical to represent both sides in any legal matter. Using a divorce analogy, he said he would not represent both persons even in an uncontested divorce.

"A lawyer shall not accept private employment in a matter in which he had (has) substantial responsibility while he was

(is) a public employee," according to Canon 9 of the Code of Professional Responsibility and the Professional Ethics Opinions of the Illinois State Bar Association.

Wanless is considered a public official while representing the village and annexation involves the village's legal rights and obligations.

OTHER professional ethics opinions reiterate Canon 9. ISBA Opinion 289 cites Canon 49 which "prohibits the lawyer in public employment, among other things, from accepting representation of a person or corporation who seeks favorable consideration on any matter pending before the public body by which he is employed."

Wanless doesn't view his action as a conflict of interest. His definition of a conflict of interest is any proposal that "wasn't in harmony with what the village wanted to be done." As long as plans correspond with the village's best interest, then there could be no conflict, he said.

By that interpretation, he would view the annexation of certain properties as a desirable thing. Therefore, he wouldn't consider himself in conflict.

However, his definition is contrary to all known principles of law, according to Ludwig Kolman of the Better Government Association legal staff in Chicago.

Trustee Ruth Ferguson, who is an announced candidate for mayor, researched the village's annexation procedure and claimed it was a financial hardship to potential residents and caused a conflict of interest for Wanless.

She recommended last Feb. 2 that the village attorney continue to prepare annexation petitions, but at no cost to the annexing party. The homeowner annexing would still pay annexing fees to the village, but not to Wanless.

Those annexing would also pay for the required certified plat, as they do now, according to her proposal.

When persons ask Washington Atty. Kenneth Black to represent them in annexation proceedings, he usually tells them to hire another attorney.

If the offer is too lucrative to pass up, he could ask the City Council to temporarily use another attorney so he can represent the individuals. As a result, he doesn't represent both the city and the annexing petitioners.

MANY CITIES pay the attorneys' fees connected with annexation because of the anticipated tax revenue from the additional residents.

"The village board policy of permitting the village attorney to prepare the necessary papers to annexation at the expense of the property owners saves the taxpayers the expense," Wanless recently wrote in the local Morton paper.

"The annexation charge long ago established by the village board is a unique attempt to equalize the cost of water and sewer department between Morton taxpayers who are continually paying the annexing property owner who gets the immediate benefit of the system," Wanless wrote.

At the board meeting after Mrs. Ferguson's proposal, Trustee Lee Hinnen proposed that no changes be made in the village's annexation procedure.

Trustee Lloyd C. "Bud" Zobrist seconded the motion, and the board reaffirmed the village's annexation procedure. Only Trustee Ferguson voted against it.

Trustee Jack Taylor, who had supported Mrs. Ferguson's proposal was absent from that meeting.

After that, the very next motion was a petition to annex a portion of Waldheim subdivision to the village. It is one of Zobrist's development.

Zobrist abstained from the vote as the board approved the request.

At a public hearing in August 1975 for a special assessment sewer project on N. Morton Ave., where Waldheim is located Wanless said he was the attorney for the subdivision's development company known as WRCL Co.

So, he was representing Trustee Zobrist in his annexation request, as well as representing the village. He also was

preparing the special assessment project that would affect his client Zobrist, and future subdivision dwellers.

When the project was presented, Trustee Ferguson and Taylor voted against it because they claimed the Waldheim subdivision was receiving preferential treatment.

Other subdivision developers had to pay to bring their pipeline to the village's trunk line, Solly E. Ackerman, developer of Hyde Park Subdivision north of Waldheim, bore that expense himself.

With this plan, $20,000 in village tax fund were used to bring the auxiliary trunk line directly to the Waldheim subdivision. There was a cost to developer Zobrist, also a village trustee.

Once that line was furnished, the individual lots were assessed for the remainder of the sewer project costs. The entire sewer system forming the subdivision was provided without any cost to WRCL Co.

Additionally, the engineering firm for the subdivision, sewer assessment project and village was Kingdon & Naven.

Zobrist's relationship with Wanless can be noted as far back as 1959, when Wanless was the registered agent for the Country Aire Club Zobrist and four other members of his family were listed as directors of the not-for-profit private recreational center.

Wanless was also the registered agent in for the Field Corp., which directs a Shopping Center, another Zobrist developement.

Wife's Land Value Benefits From Wanless-Prepared Rezoning Law

MORTON—A rezoning ordinance prepared by Village Atty. Frank M. Wanless in 1972 multiplied the value of 35 acres of land belonging to his wife.

The land, adjacent to Grundy School here, is being purchased by Louise Wanless on a contract for deed basis.

She agreed to buy the land, then zoned single-family residential on Oct. 20, 1972. A public hearing to "update the village map" was conducted on Nov. 27, 1972, on changing her land to multiple-family residential.

The Village Board approved this change, along with 13 other rezoning classifications on Dec. 4, 1972.

Ray Litwiller, of Columbia, Mo., who still holds the deed for the Wanless property, said he knew the land was to be rezoned when he sold it to Mrs. Wanless. He would not discuss the transaction further.

With little discussion at the public hearing, the Planning Commission recommended the 14 parcels of land included in the ordinance be rezoned.

Some zoning classifications were new and others were aligned to comply with rezoning already approved by the board since the publication of previous zoning maps.

Former Tazewell County State's Atty. C. Brett Bode investigated the ordinance and said he could not find "any criminal violation."

"It is legally, ethically improper to represent both sides of any controversy or contract, especially by a public attorney, employed by the public, the taxpayers," he said.

Bode told Wanless to stop representing both the village and clients in the same governmental matter. This is especially so when his wife is involved, Bode said.

Defending his preparation of the ordinance, Wanless wrote: "Mrs. Wanless is her own free agent.

"She certainly has as much right as anyone, . . . to buy and own property in Morton. In fact she does and has for many years owned property in her own name.

"Because I was attorney for the village, she should have been neither favored nor penalized. She had contractural interest in the land, not I," Wanless wrote.

To be certain his wife wouldn't be "favored nor penalized" by his position, Wanless could have asked that another attorney prepare the ordinance.

"Was this (the rezoning) in the best interest of the taxpayers of Morton or the best interest of Mr. Frank Wanless?" Trustee Ruth Ferguson asked at a public meeting.

Canon 5 of the Illinois Code of Professional Responsibility states that a lawyer's professional judgment should be exercised "free of compromising influences and loyalties."

Lawyers who serve as public officials "should not engage in activities in which his personal or professional interests are or . . . may be in conflict with his official duties," according to Canon 8 of the Code.

Other parcels of land rezoned with the passage of the ordinance include two tracts owned by William Roecker, secretary of the Planning Commission.

Former Village Board members William M. Miller and Ervin Kahler also had land reclassified with the board action. Two parcels are listed with "owners unknown" in the Tazewell County Recorder of Deeds Office.

Usually rezoning petitions are presented by the individuals requesting the change. They submit a legal description of the property to be rezoned and pay a $75 fee.

This is a common procedure followed in surrounding communities, although the fee may vary.

THERE WAS no such rezoning petition, legal description or fee paid for reclassifying the Wanless property, or other parcels rezoned with it.

That is because the village initiated the change, not at the request of Mrs. Wanless or anyone else, Bode said. Municipalities can and do rezone property to adhere to the community's comprehensive master plan.

There is no record as to who proposed this change and to what plan it had to conform.

Apartments could be built on the Wanless tract, but there has been no development there in four years.

Village trustees here have rezoned privately owned property in the past without a direct notice to the owner, such as a registered letter.

Publishing legal notices on public hearings about proposed rezonings satisfies the law, Bode said.

During the public hearing on Nov. 25, 1972, no names of property owners were given and only three common addresses were given. The other 11 parcels were described with legal terms.

No adjacent property owners were notified of the proposal to rezone property.

In Washington, names of property owners requesting rezoning and common addresses of such properties are published in the newspaper legal notice.

Property owners in Peoria living within 300 feet of property to be rezoned are notified of these requests before public hearings.

Office-Supreme Court, U.S.
FILED
JAN 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1145

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RHONDA ROTHBALLER,

and

THE PEORIA JOURNAL STAR, INC.,

Petitioners,

v.

FRANK M. WANLESS,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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No. 82-1145

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Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

MAY IT PLEASE THE COURT:

In accordance with Rule 22 of the Rules of the Supreme Court of the United States, the Respondent, Frank Wanless, provides the following Response to the Petition for Writ of Certiorari to the Illinois Supreme Court filed by Rhonda Rothballer and The Peoria Journal Star, Inc.

We respectfully submit that there exist no grounds for this Court to exercise its discretion to review the judgment of the Fourth District Appellate Court of the State of Illinois sitting in the stead of the Third District Appellate Court in this matter.

STATEMENT OF FACTS

At the time the incidents complained of took place, Frank Wanless served as attorney for the Board of the Village of Morton, Illinois. Rhonda Rothballer, a reporter for The Peoria Journal Star, a newspaper of general circulation in the community in which Frank Wanless practices law and in the village which he served as attorney, wrote and the newspaper published an article, stating among other things: ". . . Frank M. Wanless has been paid twice for preparing annexation papers—by the village and by clients wishing to annex to the village."

The article in question and a subsequent publication, which is likewise the subject of the suit in caption, stated that Wanless' conduct constituted a conflict of interest.

The trial court granted a Motion for Summary Judgment filed in behalf of the defendant newspaper and its reporter. The matter was appealed to the Third District Appellate Court which transferred the same to the Fourth District pursuant to the Order of the Chief Justice of Illinois. After having considered the briefs of the parties and hearing oral argument, the Appellate Court made the following findings:

(1) The statements complained of in Wanless' suit for libel were not capable of an innocent construction.

(2) The statements were not true as a matter of law, and

(3) A trier of fact could find that the statements were made with actual malice.

The Appellate Court reversed the trial court and sent the matter back for a hearing on its merits. Within the time limited by the Rules, the defendant newspaper and its reporter filed their Petition asking that the Illinois Supreme Court review the matter. That Petition was denied.

ARGUMENT

The State Court Correctly Applied The *New York Times* Standard In Ruling That Questions Of Fact Remain For A Jury Regarding Petitioner's Publications.

The questions presented to this Court are raised by the decision of the Fourth District Appellate Court of the State of Illinois correcting an erroneous application of the standard for granting summary judgment under the Rules of Civil Procedure in the State of Illinois.

The matters which this Court is asked to review do not present any special or important reasons for exercising this Court's discretion in granting the petition. U.S. Sup.Ct. Rule 17(a).

There is no decision by a state court of last resort of a federal question which conflicts with another state court of last resort or of a federal court of appeals. U.S. Sup.Ct. Rule 17(b).

There is no decision of a state court which has decided previously unsettled question of federal law. There is no decision of a state court which decided a federal question in conflict with the applicable decisions of this court. U.S. Sup.Ct. Rule 17(c).

This petition is generated solely by ruling of the Fourth District Appellate Court of the State of Illinois that there exists a question of fact on the allegations of defamatory publications on the part of the defendants below, Rhonda Rothballer and The Peoria Journal Star. There has been no verdict or decision finding Rothballer or the The Peoria Journal Star responsible in damages for its publications. The court below, in its opinion, stated:

> We make no decision regarding the ultimate issue of whether the plaintiff may recover from the defendants. We merely hold that the factual questions heretofore outlined are for the jury to answer. Petitioner's Brief for Certiorari, Appendix, p. 6a.

There has been no rule of law enunciated which impermissibly conflicts with the asserted rights of the petitioner under the First Amendment of the United States Constitution. No demonstration has been made at the procedural machinery in a First Amendment defamation case has not been properly employed, or that the present machinery is constitutionally inadequate.

The newspaper contends that the Appellate Court has overlooked or ignored the "actual malice" test established by this Court in *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The words of the decision of the Appellate Court are in direct contradiction to the newspaper's contention. The Appellate Court makes it plain at in its opinion that its decision applies the underlying *New York Times* standard to the facts as presented in the Motion for Summary Judgment . . . "plaintiff has shown avenues of investigation not pursued by the defendants . . . these omissions may well be excusable; however, the issue of whether the facts and circumstances of this correct case disclose a reckless disregard for the truth is not so free from doubt that an answer can be said to exist as a matter of law . . .". Petitioner's Brief for Certiorari, Appendix, p. 5a.

The publications under review cannot be said to have been true as a matter of law. No evidence of that conclusion has been presented by the newspaper and its reporter and none has been suggested to the Appellate Court or to this Court. The implication that Wanless was guilty of a conflict of interest raised a question of fact which the Appellate Court found should be submitted to a trier of fact.

The Appellate Court has simply said that the question of whether Wanless was guilty of a conflict of interest was one for the trier of fact and not for a conclusion of law by the court. Wanless has alleged that the newspaper had access to information from which the necessary conclusion arose that the Illinois Supreme Court's Attorney's Disciplinary and Registration

Commission had found that Wanless was not guilty of a conflict of interest. If the newspaper and this reporter had such information, a failure to print it could supply the basis of a decision by the trier of fact that there was "actual malice" in the printing and publication of the articles charging such a conflict. This is more than mere failure to investigate; rather, it is evidence of a subjective state of mind on the part of the petitioners at the time the article was published. The Peoria Journal Star makes much use of the "actual malice" test as a defense but seeks to deny petitioners the opportunity to prove the state of mind of The Peoria Journal Star and its reporter at the time these articles were published. This is a decision which is peculiarly within the province of a finder of fact, and the Appellate Court recognized that at the time of its decision. Furthermore, Wanless has alleged that the reporter Rothballer had access to the records of the Attorney's Disciplinary and Registration Commission and that she had interviewed those people who had filed grievances against Wanless. If at trial, it should develop that these charges are true, then the newspaper and its reporter certainly acted with actual malice when they published charges of a conflict of interest against Wanless with full knowledge that the charges were held to have been unfounded by the Attorney's Registration and Disciplinary Commission of the Illinois Supreme Court.

In their petition, The Journal Star and its reporter, in seeking to eliminate any factual dispute, only serve to underline it. They acknowledge there exists a disagreement between Wanless and other principals concerning Wanless' role in preparing petitions and in the applicable standard for conflicts of interest. Petitioner's Brief for Certiorari at p. 11. They also glibly introduce into the dispute terms such as "substantial responsibility" and "representation" from the Code of Professional Responsibility without recognizing that any dispute over the application of those terms to Wanless' conduct is factual which resolution is inherently for the jury.

It cannot be stressed too strongly that the Appellate Court has held only that the issues presented raised questions of fact to be determined by a trier of fact, and the newspaper and its reporters were not entitled to a judgment as a matter of law.

The decision of the Fourth District Appellate Court and the decision of the Illinois Supreme Court in denying petition for leave to appeal, do not in any way inflict upon The Peoria Journal Star or other members of news media any standard which contradicts the mandate of the First Amendment to the United States Constitution. Rather, the Illinois Appellate Court and the Illinois Supreme Court have merely affirmed that when issues of fact remain following the submission of affidavits and the completion of discovery, regardless of the defendant or the standard which the plaintiff must use to prove the defendant responsible, that plaintiff is entitled to have a jury determine those questions of fact.

Frank Wanless has not had the day in court to which he is entitled. The Illinois Appellate Court has determined that his right to a trial was wrongfully denied by the granting of a motion for summary judgment. This Court is presented with no valid reason why its jurisdiciton should be invoked to reach some other determination. Nor is it presented with any valid reason why the asserted rights of The Peoria Journal Star and its reporter under the Constitution should prevail to prevent the plaintiff from having his rights under the Constitution to have a jury determine the issues presented by the complaint.

CONCLUSION

For these reasons, we urge this Court to allow the matter to be heard on its merits in the trial court and deny the Petition for Writ of Certiorari to the Illinois Supreme Court.

Respectfully submitted,

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